

**Supplemental Statement of Reasons for Dismissing the
Complaint of Thomas Harrington, et al., Regarding the Alleged
Failure of the New England Regional Council of Carpenters,
United Brotherhood of Carpenters and Joiners of America, to
Elect Officers in Compliance with the Labor-Management
Reporting and Disclosure Act.**

I. Procedural History

The complainant, Thomas Harrington, a member in good standing of a local union that is a member of the New England Regional Council of Carpenters ("NERCC"), United Brotherhood of Carpenters and Joiners ("UBC"), filed a timely complaint alleging that the NERCC fails to elect its officers directly by the membership in violation of Title IV of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482, *et seq.* (the "LMRDA" or the "Act"). Richard S. Neville, Thomas Fordham, John A. Biggins, Mark J. Durkin, Joseph Fleming, and Francis Ferguson, Jr., filed similar complaints.

The complaints stemmed from an organizational restructuring implemented by the UBC in 1996. The UBC combined state and district councils, as well as independent local unions, in larger regional councils. In New England, the restructuring resulted in the creation of the NERCC, a single, regional council overseeing 27 pre-existing local unions, which together have over 25,000 members. The locals continue as separate entities with their own bylaws and functions separate from those of the NERCC.

Three years later, in 1999, complainant Harrington filed a grievance with the International President of the UBC, arguing that the NERCC is in actuality not an "intermediate body" – as the UBC contended – but rather a "local labor organization" required under section 401(b) of the Act to "elect its officers not less often than once every three years by secret ballot among the members in good standing." 29 U.S.C. § 481(b). Harrington requested that such an election be conducted by the end of June 1999, the third anniversary of the creation of the NERCC. After the UBC failed to respond, Harrington filed his complaint with the Secretary of Labor ("Secretary"). In April 2000, the Secretary issued a Statement of Reasons explaining why she determined that the NERCC is an "intermediate bod[y]" within the meaning of section 401(d) of the Act, 29 U.S.C. § 481(d), and may therefore elect its officers every four years either by secret ballot among the members in good standing or by a vote of delegates who have been elected by secret ballot by the members in good standing of NERCC's subordinate locals.

The complainants challenged this determination in United States District Court. On motion by the Secretary, the district court dismissed the suit. *Harrington v. Herman*, 138 F. Supp. 2d 232 (D. Mass. 2001). The complainants appealed to the United States Court of Appeals for the First Circuit, which vacated the Secretary's Statement of Reasons and remanded to the district court with instructions to remand to the Secretary to provide an opportunity "to better explain" the Secretary's determination that the NERCC is an intermediate body within the meaning of section

401(d) of the Act. *Harrington v. Chao*, 280 F.3d 50, 60 (1st Cir. 2002). The court stated that the Secretary's Statement of Reasons "does not mention the governing regulations or precedents at all, contains language inconsistent with the 'functions and purposes' approach [in the Secretary's regulations at] 29 C.F.R. § 452.11, and, to the extent it purports to apply a functions and purposes approach, fails to address or adequately distinguish the two most pertinent precedents." *Id.* at 58, citing *Donovan v. Nat'l Transient Div., Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers*, 736 F.2d 618 (10th Cir. 1984) and *Shultz v. Employees' Fed'n of the Humble Oil and Refining Co.*, 1970 U.S. Dist. Lexis 12288 (S.D. Tex. 1970). The court expressly declined to rule on the merits of Harrington's challenge and left it open to the Secretary whether or not to initiate suit against the NERCC: "Should she again decide not to initiate suit, the Secretary must file a sufficient Statement of Reasons, which addresses both the application of the functions and purposes test of 29 C.F.R. § 452.11, and whether her decision is consistent with her precedents." *Id.* at 60-61.

This Supplemental Statement of Reasons is the Secretary's response to the court's order.

II. Discussion

A. Applicable Statutes, Legislative History, and Regulations.

Section 401(d) of the Act identifies two lawful methods for electing officers of "intermediate bodies":

Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

29 U.S.C. § 481(d). In contrast, section 401(b) of the Act requires "every local labor organization" to "elect its officers not less often than once every three years by secret ballot among the members in good standing." 29 U.S.C. § 481(b).

The terms "local labor organization" and "intermediate bodies" are nowhere defined in the Act.¹

¹ "Labor organization" is defined in Section 3(i) of the Act, 29 U.S.C. § 402(i), as:

. . . any organization of any kind, any agency or employee representation committee, group, association, or plan [engaged in an industry affecting commerce] in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or

The Secretary has issued regulations that specify all of the types of labor organizations to which the election provisions of Title IV apply, including intermediate bodies "such as general committees, conferences, system boards, joint boards, or joint councils, certain districts, district councils and similar organizations and to local labor organizations." 29 C.F.R. § 452.11, 38 Fed. Reg. 18324, July 9, 1973 (footnote, referring to part 451 of the same chapter for the scope of the term labor organization, omitted). The same regulation makes clear that "[t]he characterization of a particular organizational unit as a 'local,' 'intermediate,' etc., is determined by its functions and purposes rather than the formal title by which it is known or how it classifies itself."

The "joint councils" referred to in the regulation are specifically identified in the legislative history to the LMRDA as a type of intermediate body. *See* S. Rep. No. 187, 86th Cong., 1st Sess. at 47, *reprinted in* 1959 U.S.C.A.N. 2318, 2363 (Senate Report accompanying the bill that ultimately became the LMRDA (S. 1555), describing the provision for the election of officers of intermediate bodies as applying to, among others, "joint council[s]" and "other association[s] of labor organizations"). Elsewhere in the Secretary's regulations, "joint councils" are described as including "councils of building and construction trades labor organizations." 29 C.F.R. § 451.4(f)(4).

The statute and the Secretary's regulations do not further define "local" or "intermediate" labor organizations, and the Secretary has not issued a regulation or interpretative statement delineating the "functions and purposes" of these two types of organizations. However, certain basic principles may be discerned from the language and purpose of the LMRDA and the applicable regulations.

First, the Department's own regulations make clear that whether an entity is a local or intermediate union is dependent on the "functions and purposes" of the entity rather than its formal title or nominal placement within an organization. *See* 29 C.F.R. § 452.11. Therefore, the critical inquiry in determining whether an entity designated by the union as an intermediate body should instead be considered a local body is whether the intermediate body has taken on so many of the traditional functions of a local union that it must in actuality itself be considered a local union. Although the Department has never before found an organization at the middle of a union's structure to be a "local" labor organization, at some point the entity at the middle of a union's structure could take over so many of the functions and purposes of the local labor organizations that such an entity should itself also be treated as a local labor organization for purposes of the LMRDA. While the Senate Report to the bill that became the LMRDA recognizes that intermediate bodies may exercise "responsible governing power," S. Rep. No. 187, at 20, the very fact that the LMRDA specifies more frequent elections, held by direct ballot of the membership, indicates that Congress viewed local unions as performing meaningful functions. To the extent that these functions are performed by an intermediate organization, it is necessary to determine whether the subordinate organizations continue to play a meaningful role.

international labor organization, other than a State or local central body.

If the subordinate organizations in fact continue to perform functions and to exist for purposes traditionally associated with local labor unions, the union's characterization of an entity placed structurally between such organizations and the international union as an "intermediate body" will be upheld even though the intermediate body also performs some other functions traditionally associated with local unions.

Second, the legislative history of the LMRDA makes clear that "intermediate bodies" are permitted to wield real and significant authority within a labor union without being treated as "local" bodies for purposes of the LMRDA. The Senate Report to the bill that ultimately became the LMRDA stated:

The bill recognizes that in some unions intermediate bodies exercise responsible governing power and specifies that the members of such bodies as systems boards in the railroad industry be elected by secret ballot of the members of the union or union officers elected by the members by a secret ballot.

S. Rep. No. 187, at 20, *reprinted in* 1959 U.S.C.A.N. at 2336 (emphasis added). Historically, unions have not restricted the authority or responsibility for important representational activities – for example, collective bargaining and the discipline of union members – to local unions. *See, e.g.,* Herbert J. Lahne, *The Intermediate Union Body in Collective Bargaining*, 6 Indus. & Lab. Rel. Rev. 164 (1953). When the LMRDA was enacted, as today, unions varied in the manner in which representational activities were carried out. Whether local unions, intermediate organizations, or even international organizations fulfilled such responsibilities was, and is, a matter of internal union organization. Early in the administration of the National Labor Relations Act, the National Labor Relations Board rejected an argument that an international labor organization could not be certified as the bargaining representative of employees because "grievance procedures are traditionally conducted by local unions." *Lane-Wells Co.*, 79 N.L.R.B. 252 (1948).

It is not an uncommon practice for some international unions to seek certification, to contract, and to assume responsibility for collective bargaining and the observation of agreements, rather than to have their local unions do so. In some instances an international union has contracts ratified and signed by representatives of the local as well as itself. The wisdom of such procedures is not for this Board to decide, lest Government intrude too deeply into the affairs of labor organizations and employers.

Id. at 254-55 (footnotes omitted). *See also May Department Stores Co. v. NLRB*, 326 U.S. 376, 380 (1945) (St. Louis Joint Council, United Retail, Wholesale & Dept. Store Employees properly certified as representative of employees who were members of a local union represented by the Joint Council; failure to bargain with the Joint Council and application to the War Labor Board for change in wage scale and announcing application to employees without bargaining

with Joint Council constituted unfair labor practices); *NLRB v. Brown & Root, Inc.*, 203 F.2d 139, 141-43 (8th Cir. 1953) (Fort Smith, Little Rock and Springfield Joint Council certified as exclusive representative of employees, called unsuccessful strike, and represented striking employees in seeking reinstatement); *Illinois Bell Telephone Company*, 100 N.L.R.B. 101, 105 (1952) (representational election directed on petition filed by Local Joint Executive Board, Hotel & Restaurant Employees, composed of delegates from existing locals, where Joint Board authorized to enforce wage and hour scales, conduct strikes, determine jurisdictional questions and approve all contracts of constituent locals; constituent locals, however, required to comply with filing procedures of sections 9(f), (g), and (h) of the NLRA, subsequently repealed by 29 U.S.C. 431(d)). Thus, as Congress was aware when the LMRDA was passed, intermediate, national and international labor organizations conducted collective bargaining and engaged in other representational activities in some union structures instead of, or sometimes in conjunction with, subordinate local organizations.

Third, the organization's placement within the structure of a union is also highly relevant in determining whether it is a "local" or "intermediate" union. The very term Congress used to denominate these entities – "intermediate bodies" – identifies them according to their position in the union hierarchy. 29 U.S.C. § 481(d). This section of the statute identifies "general committees, system boards, joint boards, [and] joint councils" as types of "intermediate bodies"; historically, these entities have occupied the middle tier of their unions' organizational structure. Elsewhere, the statute identifies a "joint council" as "subordinate to a national or international labor organization," 29 U.S.C. § 402(i), once again using placement in the overall union hierarchy to identify an intermediate body. Therefore, although the Secretary will not defer to a union's own characterization of an entity as an intermediate body or a local labor organization, it is proper for the Secretary to take account of an entity's placement in the union's structure in making the determination whether it is an intermediate body or a local labor organization.

In short, while analysis of the statute, its legislative history and the Department's regulation makes clear that labor organizations that truly play an intermediate role in the structure of a union are permitted to conduct elections by delegate ballot, the importance of providing direct elections for officers of local unions requires careful scrutiny of the relative functions and purposes of intermediate bodies and their subordinates in order to determine whether the structural placement of the alleged intermediate accurately reflects its true role in the union.

B. Pertinent Case Law: The *Boilermakers* and *Humble Oil* Precedents.

The First Circuit faulted the Secretary's prior Statement of Reasons for failing to discuss two court decisions that involved the question whether a labor organization was a local union requiring direct election of officers every three years. The court is correct that those cases considered unions' "functions and purposes," as well as their structure, in determining the applicability of the Act's direct election requirements. Those cases, however, are readily distinguishable from the instant case because in neither case did there exist local organizations with the significant functions and purposes of the local organizations in the UBC organizational structure.

In *Donovan v. Nat'l Transient Div., Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers*, 736 F.2d 618 (10th Cir. 1984), the National Transient Division (NTD) did not claim it was an intermediate labor organization, and indeed that contention would have been impossible to maintain: the NTD occupied the lowest level in the Boilermakers' structure (*id.* at 623) and, consequently, did not occupy an intermediate position between two other labor organizations in the union's organizational structure – a necessary condition to qualify as an intermediate organization under the LMRDA. In short, there were no entities subordinate to the NTD in the Boilermakers structure that could be considered locals.

For that reason, the only questions in *Boilermakers* were (i) whether the NTD was a national labor organization rather than a local, as the district court had held, and (ii) whether the NTD was merely a division of the International and therefore not a labor organization at all, as the Boilermakers maintained. *Id.* at 622, 623. It was in the context of addressing these issues – what constitutes a labor organization, and what distinguishes a local organization from a national organization – that the court noted that the NTD engaged in negotiations, enforcement of collective bargaining agreements, and the handling of grievances, and deemed these activities to be "the functions of a local." Indeed, the Court noted that "[u]nlike the other four divisions of the International, NTD has no separate local organizations" (*id.* at 619), and, again, that NTD "has no subordinate organizational units." *Id.* at 623. Although the court held that NTD was a local labor organization and based that holding on both the "structure and functions" of NTD (*id.*), neither the Secretary nor the court purported to delineate the respective functions and purposes of local and intermediate labor organizations. Unlike the NTD, which the court held was both "functionally and structurally a local labor organization" (*id.* at 623), the NERCC clearly holds an intermediate position within the Carpenters' organizational structure – it supervises subordinate entities, the New England Carpenter locals, and is subordinate to the UBC International.

The only other relevant court decision is *Shultz v. Employees' Fed'n of the Humble Oil and Refining Co.*, 1970 U.S. Dist. Lexis 12288 (S.D. Tex. 1970). There, as in *Boilermakers*, the entity determined to be a local labor organization was found to be the entity closest to the members, with no labor organization subordinate to it in the union hierarchy. The Employees' Federation of the Humble Oil and Refining Company was an independent union that claimed it could not be a local labor organization because its constituent "divisions" were separate "local labor organizations" under the Act. The district court disagreed, finding that the divisions were "merely administrative arms" that were integral or undifferentiated parts of the union itself. *Id.* at *11. The court observed that, among other things, "[t]hese divisions do not maintain any bank accounts, lease any office space or other property, employ any persons, or maintain office addresses or telephone numbers. They do not have any dues records, membership lists, cards or applications, admission procedures or procedures governing the transfer of members from one division to another." *Id.* at *11. These divisions did not have constitutions and bylaws, and were not separately chartered. *Id.* at *5. They were not parties to separate collective bargaining agreements with Humble Oil, and its members were not differentiated in the collective bargaining agreements according to division, but rather by the type of jobs they performed. *Id.*

at *5, *12. In addition, the Employees' Federation had consistently identified itself as a "local labor organization" in reports filed with the Department of Labor and only balked at the designation of "local" when the Secretary determined that it would have to conduct direct elections of officers every three years to remain in compliance with the Act. *Id.* at *8.

Here, by contrast, the NERCC locals – which are indisputably labor organizations subordinate to the NERCC – perform nearly all the functions that the Court found lacking in the purported subordinates of the Employees' Federation.

- NERCC locals are independently chartered, have identifiable memberships, elect their own officers, and have their own bylaws.
- NERCC locals have separate offices, clerical employees and budgets, and manage separate bank accounts.
- NERCC locals determine and collect monthly dues.
- A person joins the UBC by becoming a member of a local union and can withdraw or sever connection with the union only "by submitting a clear and unequivocal resignation in writing to the Local Union."
- NERCC locals hold meetings periodically where the membership is informed of union activities and business.
- The UBC Constitution empowers local unions "to make laws and trade rules" so long as they do not conflict with the Constitution and laws of the UBC.
- NERCC locals play a role in the governance of the NERCC: a change to the NERCC Bylaws "must be submitted in writing by three (3) Local Unions."
- The UBC Constitution makes each Local Union "responsible for the carelessness or negligence of its officers" and mandates that the President of each local union must "see that bonds are procured for officers."
- The UBC Constitution makes it the "duty of a member's home Local Union to promptly charge and collect" all fines imposed under section 45(c) for "any other Local Union, District Council, Industrial Council or Regional Council" working dues or fees that are in arrears.
- NERCC locals do not negotiate collective bargaining agreements, but the membership of the locals must vote to ratify the agreements.
- Although initially appointed by a NERCC representative, stewards are local

members, and resolve most grievances without the participation of or input from the NERCC representative.

- Although the NERCC representative determines the referral process, it is administered on a local, rather than a regional, basis.
- NERCC's trial procedure requires that disciplinary matters first be referred to the relevant local's executive board for an informal hearing with the goal of an informal resolution before charges are filed with the NERCC.
- NERCC locals engage in voluntary organizing drives and lobbying, and administer scholarship and disability funds.

In short, the locals here have essentially all the functions mentioned by the court as lacking in the divisions at issue in *Humble Oil*, and other significant functions as well. In these circumstances, the locals here cannot be said to be "merely administrative arms" of the NERCC. *Humble Oil*, 1970 U.S. Dist. LEXIS 12288 at *11.

III. Decision

A review of past judicial decisions and Statements of Reasons by the Secretary indicates that in all cases where the Secretary has determined that direct election is required every three years it has been with respect to organizations that had *no* subordinate labor organizations. *See supra* at pp. 6-8. In the 44-year history of the LMRDA, the Department has never brought suit contending that an intermediate body that supervised other entities that were indisputably labor organizations was itself a local labor organization subject to the direct election requirements.²

For reasons given in Section A above, the Secretary concludes that when an organization is intermediate in the structure of a union, but takes over the "functions and purposes" of its subordinate locals, then the higher body is subject to the direct election requirement of the LMRDA. Any other rule would enable intermediate bodies to completely devalue members' direct participation in officer elections in a manner that is inconsistent with key purposes and provisions of the Act. Accordingly, while a labor organization at the middle tier of a union is

² Thus, contrary to the assumption underlying Judge Torruella's concurring opinion, a decision not to initiate suit in this case is consistent with the Department's past practice. Judge Torruella assumed it would be "futile" to draft a revised Statement of Reasons unless the Secretary was expressly adopting "a new enforcement policy and interpretation of the Act." However, as this Statement of Reasons demonstrates, a full analysis of the statute, regulations, applicable caselaw, legislative history and past practice as applied to the functions and purposes of the NERCC and the New England UBC locals indicate that the NERCC is properly classified as an intermediate body subject to direct or delegate election once every four years. Indeed, as discussed herein, the Secretary's full evaluation of applicable authorities demonstrate that filing suit against the NERCC would be unprecedented.

presumptively an intermediate organization exempt from the direct election requirements, there must be some point at which an entity at that middle tier subsumes so much authority from its subordinate unions that it must be deemed to have itself also become a local labor organization subject to the Act's direct election requirements.

This leaves open, however, the question of the respective "functions and purposes" of local and intermediate unions, and of the irreducible minimum that must remain in local unions if higher bodies are not also to be subject to the direct election requirement. As discussed above, *Boilermakers* and *Humble Oil* do not purport to address precisely which functions and purposes are so intrinsically local in nature that any labor organization having those functions and purposes must be a "local union" for purposes of the LMRDA. Commentators agree that the line between local and intermediate functions is not fixed and immutable. For example, T. Kheel, *Labor Law* § 3.01 (18 *Business Organizations* 1980), cited in *Boilermakers*, 736 F.2d at 622, asserts that "[a]ll local unions share a common core of functions," among them "the day-to-day policing of collective bargaining agreements" and "disciplining of dissident members" (*Labor Law* § 3.03[1], 3-14), but elsewhere asserts that "[t]he importance of the local union has been steadily declining. Its basic functions to an increasing degree have been assumed by district councils, joint boards, or other regional arms of the national union, and, in some instances, the functions of the locals simply have been absorbed by the national union" (*Labor Law* § 3.03[2], 3-19). Similarly, in *Law and Practice of the Labor Contract*, Callaghan & Co. at p. 86 (1957), Benjamin Werne writes that "collective bargaining is most often carried on at the local union level," and that "the labor agreement is often administered by the local." But, later in his 1957 treatise, Werne acknowledges that "as the management of union affairs has become more and more technical, affected by complex matters of legislation and economics, and as bargaining on wages and benefits has become in many industries largely a matter of following the area or industry practice set by a few leaders, authority has been concentrated in the national unions." *Id.* at p. 87. In *The Intermediate Union Body in Collective Bargaining*, 6 Indus. & Lab. Rel. Rev. 164 (1953), Herbert J. Lahne notes a similar trend toward concentration of authority in intermediate unions. See also cases cited, *supra*, p.4.

To be sure, the NERCC performs a number of important responsibilities, some of which may be traditionally associated with local unions. It negotiates collective bargaining agreements. It has exclusive authority to hire, discipline, promote, and fire all organizers and business representatives within the New England region. The NERCC's Executive Secretary-Treasurer supervises and directs all representatives and organizers. The stewards are appointed by the NERCC's representative, must report all problems arising at the job site to the representative, and serve at the representative's discretion. The NERCC determines and levies a portion of the members' dues not determined and levied by the locals, and approves all monthly dues levied by the local unions. The NERCC's Executive Secretary-Treasurer appoints all trial committees.

The locals that are subordinate to the NERCC, however, are not "merely administrative arms" of the union (*Humble Oil*, 1970 U.S. Dist. LEXIS 12288 at *11) but play such a significant role in dealing with their members that there is no basis for concluding that the NERCC must also be considered a local to carry out the purpose of the statute. As shown above, the NERCC locals

are independently chartered, have identifiable memberships, elect their own officers, and have their own bylaws. Although initially appointed by a NERCC representative, stewards are local members, and resolve most grievances without the participation of or input from the NERCC representative. The locals also administer all job referrals on a local, rather than a regional, basis. (The referral process, which is determined by the NERCC representative, may vary from local to local.) The locals determine and collect monthly dues. A person joins the UBC by becoming a member of a local union, and a member's journeyman level is determined by the local upon admission. A member can withdraw from the union only "by submitting a clear and unequivocal resignation in writing to the Local Union." Although the UBC Constitution provides that charges shall be filed and tried by a Regional Council, NERCC's trial procedure requires that alleged violations first be referred to the relevant local's executive board for an informal hearing with the goal of an informal resolution before charges are filed with the NERCC. Although collective bargaining agreements may be negotiated by the NERCC on a multi-local basis, locals are parties to the agreement and conduct ratification votes among local members. In addition to these functions, the locals also hire their own clerical employees, maintain offices, maintain bank accounts, hold meetings, engage in voluntary organizing drives, lobby, and administer scholarship and disability funds.

In sum, it is also plain that the local unions that are subordinate to the NERCC continue to perform functions and purposes traditionally associated with local unions. In these circumstances, neither the Department's regulation, nor any applicable precedent, compel a conclusion that the Secretary should require the NERCC to conduct elections in accordance with the LMRDA's election rules for local unions. Accordingly, the facts disclosed by the investigation in this case do not support a finding that the NERCC violated the LMRDA by failing to conduct its elections of officers in conformity with section 401(b) of the Act, 29 U.S.C. 481(b).